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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

151

No. [redacted]

ALVIN CHANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Alvin Chance, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on August 27, 1963.

Citations to Opinions Below.

The opinions delivered in the Court of Appeals for the Fifth Circuit by District Judge Whitehurst with Judge Cameron concurring and by Judge Brown, dissenting, are officially reported at 322 F. 2d 209, 208, and are printed with the court's judgment in Appendix A hereto. The court's opinion upon petition for rehearing, which is not yet officially reported, is printed with the court's order denying petition for rehearing in Appendix B.

Jurisdiction.

1. The judgment of the Court of Appeals sought to be reviewed was dated and entered August 27, 1963.

2. Appellants' timely petition for rehearing was denied by the Court of Appeals by order dated May 5, 1964. No extension of time to petition for certiorari has been requested or granted.

3. The statutory provision believed to confer jurisdiction on this court to review the judgment in question by writ of certiorari is 28 U. S. C., Section 1254(1).

Questions Presented.

1. Are district court jury officials affirmatively required by Title 28 U. S. C., Section 1861, as amended by the Civil Rights Act of 1957 (71 Stat. 638), to select citizens for federal jury service without regard to their qualifications to serve as jurors in the courts of the State wherein the district lies?

2. Are district court jury officials affirmatively required by Title 28 U. S. C., Section 1864, to determine, before

placing the names of prospective jurors in the jury box, that such persons possess the minimum qualifications prescribed for federal jurors by Title 28 U. S. C., Section 1861?

Statutes Involved.

1. Title 28 U. S. C., Section 1861, as amended September 9, 1957, 71 Stat. 638:

> "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless——
>
> (1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
>
> (2) He is unable to read, write, speak, and understand the English language.
>
> (3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

2. Title 28 U. S. C., Section 1864, 62 Stat. 952:

> "The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.
>
> "The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.
>
> "Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive $5 per day for each day necessarily employed in the performance of his duties.
>
> "The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the

box shall contain at least 300 names or such larger number as the court determines.

"This section shall not apply to the District of Columbia."

3. Section 40.01, Florida Statutes 1959, the pertinent text of which is set forth in Appendix C.

4. Section 97.041, Florida Statutes 1959, the pertinent text of which is set forth in Appendix C.

Statement.

On September 9, 1957 the Civil Rights Act became effective to amend Section 1861 of Title 28, United States Code, prescribing qualifications of federal jurors. Congress thereby eliminated former subsection (4) of Section 1861, which had provided that no person should be competent as a federal juror if

> "He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held."
>
> 62 Stat. 951.

The jury box for the Miami Division of the District Court for the Southern District of Florida was not thereafter refilled until July 1959 (R. 236, 260, 263). At that time, in gathering five thousand names to fill the box pursuant to oral directions from District Judge Choate (R. 245), the jury officials systematically excluded from consideration as prospective jurors those United States citizens who were ineligible under Florida law for jury service in the State courts, just as they had done when last they filled the box.

Because Florida law made eligible for State jury service only those men who were "duly qualified electors of their respective counties" and only those female electors who had "registered with the clerk of the circuit court [their] desire to be placed on the jury list" (Section 40.01(1),

F. S. 1959; Appendix C), the jury officials for the district court gathered the names of men only from lists of electors kept by the county supervisors of registration and obtained from the clerks of the circuit courts the names of women who had volunteered for State jury service (R. 236-40). The names of a small number of Negro men were provided by "ministers and different organizations" in the Negro community (R. 240). Those names were placed in the jury box and no others were considered (R. 267-68). Even those women who had volunteered to the officials for federal jury service were sent away with the admonition that they could not qualify for federal jury service until they first volunteered for State jury duty at the office of the clerk of the circuit court (R. 239, 261). Not until November 1959 did the jury officials become informed, as a result of a visit by a representative of the Administrative Office of United States Courts, that women should not be excluded "simply because they had not registered for [State] jury duty" (R. 261). District Judge Lieb stated, upon discovering a similar situation prevailing in the Orlando Division,

> "Apparently the jury commissioner and the deputy clerk were either unaware of the change of the law or forgot about it, for they deliberately and exclusively limited their selection of names for the jury box to those persons who were then registered to vote and, in the case of women, to those who had also volunteered for jury service in the State Court."
>
> *United States* v. *Hoffa* (S. D. Fla., 1961), 196 F. Supp. 25, 29.

Having gathered a number of names for inclusion in the jury box, the jury officials did not undertake to determine whether those persons possessed the qualifications prescribed by Section 1861 for federal jurors. The jury officials did not consider it was their duty to make such a determination. After the visit of the Administrative office representative in November and before December 9, 1959, when one thousand additional names were placed in the jury box (R. 242, 265-70), between forty and sixty men and women volun-

teered for federal jury service and their names were accepted for inclusion in the box (R. 266). Even as to those volunteers, no inquiry of substance was made to determine their qualifications to serve as jurors. Deputy Clerk Oswald testified that those persons were asked only three questions (R. 289): whether they were citizens of the United States (which is a qualification under Section 1861); whether they were residents of the State for one year (which is not); and whether they were residents of the county for six months (which is not). Mr. Oswald further testified:

"Q. [By Mr. Bedell:] And you don't exercise any discretion as to whether one person or another is qualified? You just put them all in, is that it?

"Mr. Boardman [U. S. Attorney for the Southern District of Florida]:

"Well, may it please the Court:

"I think that the testimony was that is after the three questions were asked.

"The Witness [Mr. Oswald]: Yes, sir.

"Mr. Boardman: So it wasn't just indiscriminate.

"The Court: Well, I think he has the right to develop the facts.

"The Witness: As Mr. Boardman says, those are the three questions that we propounded to the gentlemen, or women, that come in, *and that's all we can ask them when they come into register.*

"By Mr. Bedell:

"Q. You don't make any determination as to whether they can read, write, speak or understand the English language? A. No, sir.

"Q. You don't make any effort to determine their mental and physical condition? A. No, sir, not at that time.

"Q. You don't even ask them what their occupation is? A. No, sir.

* * * * * * *

"The Court: Or whether they have been convicted of a crime or not?

"The Witness: No, sir, not at that time.

"The Court: Or their civil rights restored by pardon or amnesty?

"The Witness: No. *That's taken care of when they are qualified on voir dire.*" R. 293-94 (Emphasis added.)

On August 11, 1960, Judge Choate ordered that the names of fifty persons be drawn from the box to serve as Grand Jurors beginning September 6, 1960 (R. 520). From that panel of fifty was formed the Grand Jury that became known as the "McKee Grand Jury" because its foreman was J. Charles McKee, Jr. (R. 9).

On January 13, 1961 the McKee Grand Jury returned an indictment in the case of *United States v. Meyer, et al.* (R. 542). At that time an indictment returned by an Orlando Division Grand Jury was under attack "upon the ground that the grand jury was improperly selected." *United States v. Hoffa* (S. D. Fla., 1961), 196 F. Supp. 25, 26. On March 22, 1961, the *Meyer* defendants similarly attacked the indictment returned against them by the McKee Grand Jury (R. 42-43).

On May 25, 1961 Judge Bryan Simpson of the Southern District of Florida, who one week previously succeeded Judge George W. Whitehurst as Chief Judge (191 F. Supp. xi), received evidence in the *Meyer* case on the issue of whether the jury officials failed to comply with the statutory requirements in filling the box from which the McKee Grand Jury was drawn. He reserved ruling on the *Meyer* motions.

On July 12, 1961 Judge Lieb dismissed the Orlando indictment in the *Hoffa* case because "the grand jury was drawn from a panel which was selected contrary to the requirements of law." 196 F. Supp. at 31. No appeal was taken by the United States from that ruling.

While Judge Simpson continued to reserve ruling on the *Meyer* motions, the McKee Grand Jury continued to return indictments. On August 2, 1961, the Grand Jury indicted petitioner Alvin Chance on charges of conspiracy and violation of the liquor laws (R. 5-9). Finally, on December 16, 1961, Chief Judge Simpson denied the *Meyer* motions attacking the Grand Jury (R. 544-45).

On March 5, 1962, petitioner Chance was permitted to file a motion to dismiss the indictment on the ground that "the Grand Jury was not selected, drawn or summoned in accordance with law" (R. 10). By agreement (R. 12), the *Meyer* record (R. 208 et seq.) was considered in connection with Chance's motion, which was denied (R. 12). Chance, convicted on March 23, 1962 (R. 16), appealed (R. 18) to the Court of Appeals for the Fifth Circuit.

District Judge Whitehurst, who had been Chief Judge of the Southern District from May 1, 1959 until May 18, 1961 (169 F. Supp. xi, 191 F. Supp. xi), was designated to sit with Circuit Judges Brown and Cameron on the panel that considered Chance's appeal. In accordance with the Fifth Circuit practice, the names of the panel members were not announced before oral argument on April 8, 1963 (R. 564). Petitioner made no objection on that occasion to Judge Whitehurst's participation.

On August 27, 1963, with Judge Brown dissenting (322 F. 2d 201, 208; Appendix A), the judgment of the district court was affirmed (R. 579). District Judge Whitehurst delivered an opinion in which Judge Cameron concurred, and held:

> "The statutes provide no affirmative requirements of the officials in gathering names for the jury box. . . . [T]he law as it now stands places the officials under no mandatory or positive commands; they are, on the contrary, controlled by one negative requirement: they may not discriminate, directly or indirectly."
>
> 322 F. 2d at 205.

In dissent, Judge Brown stated:

> "I think the practice of including (a) only those males who have registered to vote and (b) only the females who have *volunteered* for jury service does not meet the requirements, 28 U. S. C. A. § 1861, of a constitutionally empaneled Grand Jury. I therefore align myself with Judge Lieb's opinion in United States *v.* Hoffa, S. D. Fla., 1961, 196 F. Supp. 25,

and respectfully dissent from the present opinion of this Court."

322 F. 2d at 208.

On October 16, 1963 appellant filed a timely (R. 581) petition for rehearing (R. 582-89), a motion for rehearing en banc (R. 590-97), and a supporting brief (R. 599-619). On May 5, 1964, the court denied (R. 665) the petition for rehearing and filed a per curiam opinion (R. 659-63). No separate order was entered on appellant's motion for rehearing en banc.

Reasons for Granting the Writ.

I.

The Court of Appeals has decided an important federal question in a way that conflicts with the decisions of this Court in *Ballard* v. *United States*, 329 U. S. 187, 67 S. Ct. 261, 91 L. Ed. 181, and *Cassell* v. *Texas* (1950), 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839.

The chief effect of the Civil Rights Act of 1957 (71 Stat. 638) on juror selection standards in the Southern District of Florida was (or should have been) "to make women eligible for federal jury service even though ineligible under state law." *Hoyt* v. *Florida* (1961), 368 U. S. 57, 60, 82 S. Ct. 159, 162, 7 L. Ed. 2d 118, footnote 2. Yet this plain fact was unknown by the jury officials of that district. Since in ignorance they could not and did not identify the body of qualified prospective jurors in the community, they were unable to make an informed decision as to an appropriate means for gathering names from that group.

The jury officials did not consult the State voter registration lists simply because those lists afforded a convenient list of prospective jurors in the community. The

names of men only were taken from those lists (Tr. ~~27~~ 236). Neither did the jury officials determine that, because of her important role in the home, a woman should not be called for jury duty unless she should first express her desire to be called. It was not the act of volunteering but the act of volunteering to the clerk of the State circuit court that made women acceptable to the federal jury officials (Tr. ~~30, 507~~ 239, 261).

The effect of this practice was to exclude from consideration all males who were not electors and all females who were not both electors and registered volunteers for State jury duty. Such an exclusion would itself seem to require vindication of this Court's decision in *Ballard* v. *United States*, in which the Court decided that

> "the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted. . . ."
>
> 329 U. S. at 193, 67 S. Ct. at 264.

Yet, in the Southern District of Florida the jury officials did not deliberately exclude women from jury service out of hostility toward women jurors. A number of women who had volunteered for State court jury duty were in fact summoned (Tr. 522-23) and three such women served on the McKee Grand Jury (Tr. 516). Neither is there evidence that the jury officials felt that nonvoting males would not make good jurors and determined to exclude nonregistered men on that account. The jury officials acted, not out of an intention to discriminate against the classes excluded, but out of a misconception that those classes were ineligible under the standards prescribed by Congress. The conduct of the jury officials in this case cannot accurately be condemned as though they had with bad motive undertaken to exclude all nonvoters and women; neither can their conduct be justified as the Court of Appeals has attempted to justify it (322 F. 2d 201; Appendix A), by disposing of the case as if the jury officials had consulted the registration lists

and the circuit court lists of female volunteers simply as convenient indices to the larger body of qualified citizens.

In this case the jury system in the Southern District of Florida was deprived, not only "of the broad base it was designed by Congress to have" (*Ballard*, 329 U. S. at 195, 67 S. Ct. at 265), but also of the benefit that Congress sought to secure by providing for local execution and implementation of the bare statutory standards by conscientious and well-informed jury officials. The success of the statutory scheme depends on the intelligent exercise of the discretion vested in the local jury officials. In this case, the complaint is not that the jury officials exercised their discretion badly but that they did not exercise it at all. Having a duty to determine how best to identify and select names from the large body of citizens qualified by federal standards, the jury officials, acting as if it were their job only to perform the mechanical chore prescribed under Florida law, simply gathered the names of those who were listed by State officials as meeting the rather arbitrary and restrictive qualifications for State court jury duty.

In the circumstances of this case, the larger question is whether Congress has imposed on local jury officials a positive, affirmative duty to become acquainted with applicable federal standards, to identify the body of citizens qualifying under those general standards and to exercise their informed judgment in determining how best to select prospective jurors from the group. The court below held that no such duty was imposed.

The decision of the Court of Appeals is incorrect and it conflicts directly with the *Ballard* decision, in which this Court declared that Congress has enacted "prescribed standards of jury selection" and that to disregard those prescribed standards inflicts injury on the jury system:

> "The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . It is a departure from the statutory scheme. As well stated in United States *v.* Roemig, D. C., 52 F. Supp. 857, 862, '. . . It is an administrative denial

> of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to [the defendant]' . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."
>
> 329 U. S. at 195, 67 S. Ct. at 265.

The decision of the Court of Appeals conflicts also in principle with *Cassell* v. *State of Texas*, in which this Court held that Texas jury officials who were not "personally acquainted" with qualified prospective jurors of the Negro race and who failed to perform "their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color" had unlawfully discriminated against Negroes. 339 U. S. 282, 289-290 S. Ct. 629, 633, 94 L. Ed. 839. In so holding, this Court stated that it is not enough that jury officials refrain from deliberately excluding persons and classes whom they know to be qualified; it was their affirmative duty to identify and become familiar with the large body of qualified citizens beyond their acquaintance, and to do so "without regard to race and color." That duty was thereafter properly characterized by the Court of Appeals for the Fifth Circuit as "a positive, affirmative duty on the part of the jury officials and other State officials." *United States* v. *Wiman* (5th Cir., 1962), 304 F. 2d 53, 65.

This Court, which ultimately is responsible in large measure for the kind of criminal justice that is administered by United States officials of United States courts, cannot require less of those officials than is required by the Constitution of those occupying similar positions in the States. It was the "positive, affirmative duty" of the jury officials for the Southern District of Florida "to familiarize themselves fairly with the qualifications of the eligible jurors" in the community without regard to the irrelevant question of who among them were eligible to

serve as jurors in the State courts. In rendering a contrary decision based on the explicit declaration that "the statutes provide no affirmative requirements of the officials in gathering names for the jury box. . . . [and] places the officials under no mandatory or positive commands" (322 F. 2d at 205), the Court of Appeals rendered a decision in conflict with applicable decisions of this Court.

II.

The Court of Appeals has decided an important federal question in a way that conflicts with the decision of this Court in *Glasser* v. *United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Flynn* (2d Cir., 1954), 216 F. 2d 354, *cert. den.* 348 U. S. 909, and with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Henderson* (7th Cir., 1962), 298 F. 2d 522, *cert. den.* 369 U. S. 878.

Section 1864 of Title 28 requires the jury officials to select and place in the jury box the names of three hundred "qualified persons" or such larger number of "qualified persons" as the court determines. Title 28 U. S. C., Sec. 1861. In *Glasser* v. *United States* this Court affirmed that "this duty of selection may not be delegated" by the jury officials. 315 U. S. at 85, 62 S. Ct. at 472.

In the cases of *United States* v. *Flynn* and *United States* v. *Henderson*, the Courts of Appeals for the Second and Seventh Circuits recognized the obligation imposed on jury officials to exercise their judgment in screening out those prospective jurors who do not meet, as a very minimum, the qualifications prescribed by Congress. In those cases, the courts approved the imposition of other reasonable standards which were indiscriminately applied on a local level by the jury officials.

If Congress contemplated that jury officials *may* exercise their judgment in measuring prospective jurors by standards adopted locally, surely that body intended that those officials *shall* do so in enforcing statutory standards In *Glasser*, this Court spoke of "this *duty* of selection," not of a *privilege* of selection. In this case, the jury officials made no determination of whether the persons whose names were gathered had been convicted of a crime and had not been restored their civil rights [a disqualification under Section 1861(1)], whether they could read, write, speak or understand the English language [as required by Section 1861(2)], or whether they were mentally and physically able to render efficient jury service [as required by subsection (3)] (Tr. 79-80). The deputy clerk testified that "that's taken care of when they are qualified on voir dire" (Tr. 80).

It is evident that the jury officials, having gathered a number of names principally from the State lists of electors and female volunteers for jury service, made no effort to select from that group those who possessed the minimum qualifications prescribed by Congress in Section 1861. In a charade based on Section 1861's requirement that

> "the jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box."
>
> 28 U. S. C., Sec. 1864.

the two jury officials, without even examining the names individually, alternately seized large handfuls of paper slips bearing names and dropped them in the box (Tr. 56). Thus, the jury officials sought to delegate their responsibility of selection to the district judges. But "this duty of selection may not be delegated" [*Glasser* v. *United States* (1942), 315 U. S. at 85, 62 S. Ct. at 472], not even to the district judges. *United States* v. *Silverman* (D. Conn., 1955), 129 F. Supp. 496.*

* "Did the jury commission fulfill its express statutory duty of placing in the box preparatory to the drawing of September 2, 1953, the names of not less than three hundred qualified persons? This

In response to petitioner's contention that the duty to select qualified jurors is a positive, affirmative and nondelegable duty imposed by Congress on the jury officials, the Court of Appeals held that "the statutes provide no affirmative requirements." 322 F. 2d at 205. This decision conflicts not only with the cited cases and with *Wilson* v. *United States* (5th Cir., 1939), 104 F. 2d 81, *cert. den.*, 308 U. S. 574 [in which the Fifth Circuit itself declared it to be the jury officials' duty "to make inquiry before the names of jurors were placed in the box"] but also with many other cases, including *Beatrice Foods Co.* v. *United States* (8th Cir., 1963), 312 F. 2d 29; *United States* v. *Henderson* (E. D. Wis., 1961), 198 F. Supp. 278, 279, being the district court decision giving rise to the *Henderson* appeal heretofore mentioned; *United States* v. *Brandt* (N. D. Ohio, 1955), 139 F. Supp. 362, 364; *United States* v. *Standard Oil Company* (N. D. Ind., 1958), 165 F. Supp. 359, 361, 363; *United States* v. *Romano* (D. Conn., 1961), 191 F. Supp. 772; *United States* v. *Fujimoto* (D. Hawaii, 1952), 102 F. Supp. 890; *United States* v. *Greenberg* (S. D. N. Y., 1961), 200 F. Supp. 382.

The statutory scheme outlined by this Court in *Ballard* contemplates that the enacted standards be enforced and that they be enforced by the jury officials who otherwise have no reason for existence. They are, indeed, "the officials charged with choosing federal jurors." *Glasser* v. *United States*, 315 U. S. at 86, 62 S. Ct. at 472. In this respect, too, the Court of Appeals for the Fifth Circuit rendered a decision in conflict with applicable decisions of this court and decisions of other Courts of Appeals.

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question cannot be answered in the affirmative because the jury commission, which alone had power to decide who was qualified, did not know at that time; moreover, it still did not know at the time of the hearing." 129 F. Supp. at 508-09.

III.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

In the *Ballard* case this Court

> "granted the petition for certiorari because of the serious questions concerning the administration of criminal justice which were raised."
>
> 329 U. S. at 189, 67 S. Ct. at 262.

In this case the "serious questions concerning the administration of criminal justice" relate not only to the conduct of the jury officials in failing to perform the mandatory duties imposed on them by Congress but also to the manner in which the issue regarding jury selection in the Southern District of Florida was disposed of by the District Court and by the Court of Appeals.

The McKee Grand Jury began deliberations at Miami in September 1960 (Tr. 516). Soon afterwards the initial attack was made on the juror selection procedures prevailing in the Orlando Division of the Southern District of Florida. See *United States* v. *Hoffa* (S. D. Fla., 1961), 196 F. Supp. 25. On March 22, 1961, in the *Meyer* case, the first motion to dismiss a McKee Grand Jury indictment because of the selection procedures in the Miami Division was filed (Tr. 542) and on May 25, 1961, the District Court heard the evidence on which petitioners' showing here is based (Tr. 209).

Although the McKee Grand Jury indictments were subject to grave question based on evidence which was then known to all concerned, the United States permitted that Grand Jury to continue its deliberations throughout and beyond the summer of 1961. Petitioner was not indicted

until August 2 (Tr. 9), over two months after the facts regarding jury selection were known. When Judge Simpson finally ruled in *Meyer* on December 16, 1961 (Tr. 545), rulings by other judges soon followed in other criminal cases in which the question was raised on the *Meyer* record (Tr. 546, 549).

Upon conviction, petitioner appealed to the United States Court of Appeals for the Fifth Circuit, a tribunal that could be expected to provide a wholly disinterested review of the selection procedures followed by the jury officials and approved by several district judges. On the day of oral argument petitioner was confronted with the fact that District Judge George W. Whitehurst—who had been Chief Judge of the District when the Miami Division jury box was filled and replenished in the manner complained of, when the McKee Grand Jury was sworn, when the initial attacks on the juror selection procedures in the Orlando and Miami Divisions were made (169 F. Supp xi, 191 F. Supp. xi), and who personally had adjudged guilty and sentenced two persons under indictment by the McKee Grand Jury (Tr. 620)—had been designated to sit as a member of the three-judge panel that was to consider petitioner's appeal.

The decision of the Court of Appeals in this case was determined by Judge Whitehurst's vote for affirmance, in the circumstance of a difference of opinion between Judges Cameron and Brown. For himself and Judge Cameron, Judge Whitehurst delivered the opinion of the court. Judge Brown dissented (see Appendix A).

Chance petitioned for a rehearing and filed a separate motion for a rehearing en banc. In this petitioner was supported by four members of the bar of the Court of Appeals who, because they represented defendants in criminal cases who also had attacked the validity of the Grand Jury, had been permitted to file amici briefs (see Tr. 582, 590, 599). One of the principal grounds of petitioner's motion for rehearing en banc was the impropriety of Judge Whitehurst's participation (Tr. 590-97).

On May 5, 1964, a panel consisting of Judge Brown and Judge Whitehurst, who recited that Judge Cameron joined in the disposition prior to his death, denied rehearing (Appendix B). No separate order was entered on petitioner's motion for rehearing en banc.

It was illegal for the United States jury officials to ignore the mandate of Congress in selecting prospective jurors. It was improper for the District Court to let stand an indictment returned by the McKee Grand Jury. It was especially improper for the District Court, knowing all of the circumstances surrounding the selection of that Grand Jury, to permit that group to continue to exercise the power to indict. It was improper for the Court of Appeals to designate Judge Whitehurst as a member of the panel hearing petitioner's appeal and it was improper for him to sit as a member of that panel. It was improper for the Court of Appeals to let stand, without at least en banc review, a decision that was determined by Judge Whitehurst's vote and announced by his opinion. It was improper for the Court of Appeals to permit Judge Whitehurst to participate in the consideration of petitioner's requests for rehearing and for rehearing en banc.

This criminal proceeding has thus far been marked by repeated failures by officials of the United States to administer criminal justice in an appropriate way. In each of the courts below petitioner seriously questioned the standards of judicial administration that apparently prevailed in that court. Each court gave the standards heretofore announced by Congress and by this Court a most grudging and narrow interpretation. In doing so, those courts neglected this Court's admonition that United States judges are not "mere moderators." [*Quercia v. United States* (1933), 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321] and abandoned the principle that

> "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'"
>
> *In Re Murchison* (1955), 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942.

Conclusion.

The writ of certiorari should be granted.

Respectfully submitted,

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